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IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1984

JOHN L. NORD, JR. PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARKANSAS

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OPINION BELOW

The opinion of the Arkansas Court of Appeals affirming the Trial Court was not designated for publication; a copy is reproduced in the Appendix, infra. The orders of that Court granting stay of execution of the judgement pending petition for certiorari is reproduced in the Appendix, infra.

JURISDICTIONAL STATEMENT

The opinion of the Arkansas Court of Appeals was delivered on 5 July, 1984. Notice of Appeal to the U. S. Supreme Court was filed August 1, 1984.

This Court has jurisdiction by virtue of 28 U. S. C. § 1257 (3).

LEGAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT #:

14. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARKANSAS STATUTORY PROVISIONS & RULES

41-1801. Definitions. - As used in this Chapter [§§ 41-1801 - 41-1812], unless the context plainly requires otherwise:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(a) the penetration, however slight, of the anus or mouth of one [1] person by the penis of another person; or

(b) the penetration, however slight, of

the vagina or anus of one [1] person by any body member or foreign instrument manipulated by another person.

(2) "Forcible compulsion" means physical force, or a threat, express or implied, of death or physical injury to or kidnapping of any person.

(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

(4) "Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent.

(5) "Physically helpless" means that a person is unconscious or is physically unable to communicate lack of consent.

(6) "Public place" means a publicly or privately owned place to which the public or

substantial numbers of people have access.

(7) "Public view" means observable or likely to be observed by a person in a public place.

(8) "Sexual contact" means any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female.

(9) "Sexual intercourse" means penetration, however slight, of a vagina by a penis. [Acts 1975, No. 280, § 1803, p. 500.]

41-1803. Rape - (1) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:

(a) by forcible compulsion; or

(b) who is incapable of consent because he is physically helpless; or

(c) who is less than eleven (11) years old.

(2) Rape is a class A felony. [Acts 1975, No. 280, § 1803, p. 500.]

RULE 21. JOINDER OF OFFENSES AND DEFENDANTS

CRIMINAL PROCEDURE RULE 21.1 Joinder of Offenses.

Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(a) are of the same or similar character, even if not part of a single scheme or plan; or

(b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

RULE 22. SEVERANCE OF OFFENSES AND DEFENDANTS

CRIMINAL PROCEDURE RULE 22.1 Timeless of Motion; Waiver; Double Jeopardy.

(a) A defendant's motion for severance of offenses of defendants must be timely made

before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.

(b) If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(c) Unless consented to by the defendant, a motion by the prosecuting attorney for severance of offenses or defendants may be granted only if timely made prior to trial.

(d) If a motion for severance is granted during the trial and the motion was made or consented to by the defendant, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses severed.

RULE 22.2 SEVERANCE OF OFFENSES.

(a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:

(i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

UNIFORM EVIDENCE RULE 404. Character evidence not admissible to prove conduct. exceptions - other crimes. - (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of this character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in

Rule 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

On April 16, 1982, Casandra Johnson, a minor, and her mother, Carmen Johnson, reported to the Ashley County Sheriff Department that Casandra Johnson had been raped early that morning by John L. Nord, Jr.; in subsequent interviews with the alleged victim and the mother, it was alleged that on April 10, 1982, the victim had also been raped by John L. Nord, Jr.

John Nord was charged with two counts of rape, corresponding with the dates alleged by the victim - April 10, and April 16, respectively; at a pretrial hearing, the petitioner moved the trial court to sever the two counts for purposes of trial on the grounds that they were separate and distinct incidents. (T. 105); again at the beginning of trial the petitioner sought to have the charges severed for purposes of trial (T. 331); the trial court refused the severance

(T.105).

Throughout the trial, the court allowed the victim, and the victim's mother over the objection of petitioner, to testify to numerous other bad acts by the defendant which were remote in both time and place from the rapes alleged in the charge for which petitioner was standing trial (T. 433, 435, 438, 440, 441, 445, 446, 511, 514, 516, 518, 520, 523, 525, 527, 535, 537, 538).

On trial of the charges, the petitioner was found guilty of both counts and sentenced to ten years on each, run consecutively; on appeal to the Arkansas Court of Apeals, the judgement was affirmed; the petitioner here alleges that he was denied certain rights and privilages guarenteed by the U. S. Constitutional disregard etc.

ARGUMENT

I

AT A TRIAL FOR RAPE OCCURING ON SPECIFIED

DAYS, THE ADMISSION OF PROOF OF RAPE AND OTHER BAD ACTS ON OTHER DATES AND IN OTHER INCIDENTS IS VIOLATIVE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS OF THE STATE OF ARKANSAS, PURSUANT TO AMENDMENT 14 TO THE UNITED STATES CONSTITUTION.

Petitioner was charged with and tried for rape, allegedly occuring on the dates of April 10, and April 16, 1982, respectively; at the trial, the prosecuting witness, and her mother were allowed, over the objections of petitioner to testify regarding rape of the prosecuting witness on September 29, 1981, supposedly occuring in Union County, Arkansas, outside the jurisdiction of the Court (T. 433, 435, 438, 511, 514); in Pulaski County, Arkansas, outside thejurisdiction of the trial court, in March, 1982, (T. 440, 441, 516, 518, 520); on another unspecified date between the March 1982 incident in Little Rock and the April

10, 1982 incident in Ashley County, the County where the Court sets (T. 445, 446, 523, 525, 527, 528).

This court has stated that proof of the crime charged by evidence of other crimes or bad acts , not connected to the crime charged is not permitted. Michelson v. United States, 335. U. S. 469, 69 S. Ct. 213, 93 L. ed 168 (1968). Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077 (1892); this rule has been adhered to and followed by every U. S. Judicial Circuit, as required by due process clauses of the 5th and 14th Amendments to the U. S. Constitution. U. S. v. DeLuzio, 454, F. 2d 711(6 10th Cir. 1972), Cert. den. 92 S. Ct. 2467, 407 U. S. 922, 32 L. ed. 808; Cram v. U. S., 316 F. 2d. 542 (10th Cir. 1963); Wright v. U. S., 389 F. 2d 996 (8th Cir. 1968); Edwards v. U. S., 333 F. 2d 588 (8th Cir. 1964); U. S. v. Nemeth, 430 F. 2d 704 (6th Cir. 1970); U. S. v. Harris, 331 F. 2d 185 (4th Cir. 1964); Davis v. U.

S., 413 F. 2d 1226 (6th Cir. 1969); U. S., v. Fierson, 419 F. 2d 1020 (7th Cir. 1969); U. S. v. Deaton, 381 F. 2d 114 (2nd Cir. 1967); U. S. v. Johnson, 382 F. 2d 280 (2nd Cir. 1967); U. S. v. Basen, 308 F. Supp. 65 (E. D. Pa. 1970); Courtney v. U. S., 390 F. 2d 521 (9th Cir. 1968);

Also see U. S. v. Moody, 530 F. 2d 809 (8th Cir. 1976); Tallo v. U. S., 344 F. 2d 467 (1st Cir. 1965); U. S. v. Christian, 427 F. 2d 1299 (8th Cir. 1970), Cert. den. 91 S. Ct. 153, 400 U. S. 909, 27 L. ed. 148;

Petitioner acknowledges that there is a well established exception to the above rule to the effect that, evidence of other crimes may be admissible if (1) it is of the same or similar type, and (2) connected to the crime charged; on (3) shows motive or intent, or (4) tends to prove identity of the accused, or (5) establishes a plan, scheme or mode of operation for the purpose of proving the violation was not occassioned by mistake or

error. U. S. v. Jones, 491 F. 2d 526 (8th Cir. 1973); Parker v. U. S., 400 F. 2d 248 (9th Cir. 1963); and that the decision admitting or exclueing such evidence is left in the first instance to the sound descretion of the trial judge. U. S. v. Marshall, 683 F. 2d 1212 (8th Cir. 1982); However such evidence, even when otherwise admissible as one of the exceptions permitted, should not be admitted if its prejudicial effect outweight its probative value; and the trial judges exercise of descretion is not unlimited, nor beyond the scope of review by reviewing courts. U. S. v. Fierson, 419 F. 2d 1020 (7th Cir. 1969); U. S. v. Clemons, 503 F. 2d 486, 490 (8th Cir. 1974).

In the instant case, the proof consisted of the victims testimony that she was raped on the dates alleged, and the mother's testimony that she was raped on the dates alleged. The defendant didn't testify; no witness on behalf of the defendant testified

as to his good character; so defendant's character was never pert in question; the question of motive (sexual gratification) is obvious in he charge itself (Ark. Stat. § 41-1801, et seq); there was no question of defendants intent - either he committed the crime forceably as the witness testified, or he did not commit it; in this case, since the victim and the mother were well acquanted with the defendant, there was no question of identity; finally, since there was no claim that the crime was committed by the defendant out of mistake, ignorance, inadvertance, the question of mode of operation was never an appropriate subject for the prosecution, much less proof thereof by other crimes. The only remaining arguable purpose for producing evidence of the prior bad acts in this case, or justification for permitting the introduction thereof, is that they are a part of the charge being tried - a single transaction or episode. Carter v. U. S., 549

F. 2d 77 (8th Cir. 1977).

Arkansas Supreme Court has declared that each act of intercourse or Sexual Gratification sufficient to form the basis of the charge, is a seperate and distinct offense. Holland v. State, 375 S. W. 2d 243, 237 Ark. 649 (1964); in a case very similar to the one at bar, the Court of Appeals of Arkansas held that testimony of the defendants sexual contact with the same 9 year old victim only hours prior to the incident for which he was being tried was not admissible. Harper v. State, 614 S. W. 2d 237, 1 Ark. App. 190 (1981); that in order for other specific acts to be a part of the crime charged, they must be interrelated both in time and substance to the crime charged. Setters v. State, 627 S. W. 2d 263, 4 Ark. App. 46 (1982); Harper v. State, 643 S. W. 2d 585, 7 Ark. App. 28 (1982) it is stated at C. J. S. Rape § 4 & 5 (1983 Repl.) that Rape is distinguishable from other sexual offenses in

that it is not a continuous offense, but each act of intercourse is an entire and separate offense. C. J. S. Rape § 4 & 5. See West Words and Phrases, Single Criminal Episode, Vol. 39, P. 103 (1984 Repl).

Since the other crimes or bad acts testified to by the State's witnesses were not a part of the "Transactions" for which the petitioner was being tried, and since none of the exceptions to Rule excluding evidence of prior bad acts is applicable here, it was a violation of due process, as guaranteed by the 5th, 14th Amendments to the u. S. Constitution for the Trial Court to allow petitioner's conviction upon such testimony.

Additionally, in light of the decisions by the Supreme Court of Arkansas and the Court of Appeals of Arkansas consistent holding that evidence of other crimes is not admissible to prove guilt of the crime charged, unless it meets one of the

constitutional exceptions therefor, Moser v. State, 583 S. W. 2d 15, 266 Ark. 200 (1979); Rios v. State, 575 S. W. 2d 198, 262 Ark. 407 (1977); Alford v. State, 266 S. W. 2d 804, 233 Ark. 330 (1954); Clark v. State, 442 S. W. 2d 225, 246 Ark. 1151 (1969); Kellensworth v. State, 631 S. W. 2d 1, 275 Ark. 252 (1982); Harper v. State, 43 S. W. 2d 585, 7 Ark. App. 28 (1982); Smith v. State, 587 S. W. 2d 50, 266 Ark. 861 (Ct. App. 1980); Sweat v. State, 473 S. W. 2d 913, 251 Ark. 650 (1971); Summerlin v. State, 643 S. W. 2d 582, 7 Ark. App. 10 (1982), and the holdings by such courts that evidence of other acts or crimes is not admissible as a part of the crime charged unless interrelated in time and substance. Setter v. State, Supra; Harper v. State, Supra, it was a denial of equal protection guaranteed this petition under Amendment 14 to the U. S. Constitution.

II

THE TRIAL OF PETITIONER ON TWO CHARGES OF RAPE, OCCURING ON APRIL 10 AND APRIL 16, 1982, RESPECTIVELY, OVER PETITIONER'S OBJECTION, AND IN LIGHT OF ARK. RULES OF CRIMINAL PROCEDURE #22.2, AND THE CASES INTERPRETING THE SAME BY THE ARK. APPELLATE COURTS, VIOLATED PETITIONERS DUE PROCESS AND EQUAL PROTECTION GUARANTEES UNDER THE 5TH AND 14TH AMENDMENTS TO THE U. S. CONSTITUTION.

The Petitioner was charged with rape of the victim, Cassandra Johnson on the 10th of April, 1982 and on the 16th of April, 1982. Petitioner moved for severance of the charges at the pretrial hearing and at the beginning of trial; (T. 105 & 331) the motion was denied, even though the prosecution did not oppose it (T. 105). At the trial however, the State maintained that the charges were all a part of a single transaction.

Rape is defined at Ark. Stats. §41-1801 and 1803, and means sexual intercourse or deviate sexual activity with a person by force, ... or with a person under the age of 11 years; sexual intercourse is an act of penetration of the vaginal by the penis; devate sexual activity is an act of sexual gratification ..., Ark. Stats. §41-1801; each "act" constitutes a separate offense. Holland v. State, 375 S. W. 2d 234, 237 Ark. 649 (1964).

Rape is distinguished from other sexual offenses; it is not a continuous offense, but each act of intercourse is an entire and separate offense. C. J. S., Rape §4 & 5, (1983 Repl.) for any prior acts to be part of the offense charged, they must be interrelated in both time and substance. Setter v. State, Supra., Harper v. State, Supra.

In the instant case, the charged acts are separated by some 7 days, during which time

the alleged victim was not in defendant ; presence or custody. It is clear therefore that the two charges here alleged were not "a single transaction or course of conduct". See argument one above.

Rule 21.1, Arkansas rules of Criminal Procedure, provides that multiple offenses of the same or similar nature may be joined. Goodwin v. State, 568 S. W. 2d 3, 263 Ark. 856 (1978); However, Rule 22.2 provides that a defendant is entitled as a matter of right to the severance of charges joined for trial when the only basis of their joinder is that the nature of the crime is the same or similar, and the defendant makes a timely motion therefor. Teas v. State, 587 S. W. 2d 28, 266 Ark. 572 (1979); Goodwin v. State, 568 S. W. 2d 3, 263 Ark. 856 (1978).

Petitioner made his timely motion, but was denied (T. 105, 331). The effect of such trial was to allow the introduction into the trial of each charge, proof of other crimes

and prior bad acts (the other charge), to prove the crime being tried, in violation of the Rule of this Court and other Federal Courts against admitting such evidence as irrelevant, prejudical and violative of due process clauses of the 5th and 14th Amendments to the u. S Constitution. See argument above for discussion and citations.

Such a trial, in light of the clear language of the State Rules of Criminal Procedure #21 and 22, and in light of the consistent holdings of the Appellate Courts of Arkansas, denied petitioner the equal protection of the laws of the State of Arkansas. Watson v. Oaklawn Jockey Club, 86 F. Supp. 1006, Affm. 183 F. 2d 440 (8th Cir. 1950); U. S. v. State of Louisiana, Ex Rel Francis v. Resweber, La., 67 S. Ct. 374, 329 U. S. 459, 91 L. ed 422, Rehearing den. 67 S. Ct. 673, 330 U. S. 853, 91 L. ed. 1295; Shelby v. Kraemer, Mich. & Mo., 68 S. Ct. 836, 334 U. S. 1. 92 L. ed 1161; Lynch v. U.

S., 187 F. 2d 476, Cert. den. 72 S. Ct. 50, 342 U. S. 831, 96 L. ed. 629; Griffin v. People of State of Ill., 76 S. Ct. 585, 351 U. S. 12, 100 L. ed 891, Rehearing den. 76 S. Ct. 844, 351 U. S. 958, 100 L. ed 1480; U. S. v. MacCullom, 96 S. Ct. 2086, 426 U. S. 317, 48 L. ed 666, on Remand, 538 F. 2d 290.

CONCLUSION

For the aforementioned reasons, and authorities, the Petitioner prays a Writ of Certiorari to the Arkansas Court of Appeal.

Respectfully submitted,

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Appendix

ARKANSAS COURT OF APPEALS

JOHN L. NORD, JR. APPELLANT

V. NO. CA-CR-83-176

STATE OF ARKANSAS APPELLEE

OPINION DELIVERED: July 5, 1984

APPEALED FROM
ASHLEY COUNTY CIRCUIT COURT

HONORABLE PAUL K. ROBERTS, JUDGE

AFFIRMED

TOM GLAZE, Judge

Appellant was convicted of twice violating Ark. Stat. Ann. § 41-1803 (Repl. 1977), by engaging in sexual intercourse with a ten-year-old girl by forcible compulsion. Appellant was found guilty on each count at a jury trial and sentenced to a term of ten years for each violation, the sentences to run consecutively.

The victim of Appellant's attacks was the ten-year-old daughter of his girlfriend. The victim's mother testified that prior to the rapes committed in April of 1982, the Appellant had sexually assaulted the child at motels in El Dorado and Little Rock while the three were staying there. The mother's testimony was to the effect that, in each instance, the Appellant would separate her from her daughter for a period of time, for example, by sending her down to the motel lobby for thirty minutes while he remained with the little girl. According to the mother, on April 16, 1982, Appellant used a pistol to force her to send the girl into one of the bedrooms with him in her house trailer and held the pistol on the girl to force her to have sexual intercourse with him.

The victim testified that Appellant had, in fact, sexually assaulted her before the April incidents. She described the rapes that occurred in April in great detail. She

said that during each incident, Appellant kept a pistol close at hand and that during the April 16 rape, he threatened to put her "where dead people was" if she did not cooperate. The incidents occurred at Appellant's home on April 10, 1982, and at the mother's house trailer on April 16, 1982. The girl also testified that before the April 16 incident at the Appellant's home, he showed her a pornographic film to instruct her as to what she was supposed to do during sexual intercourse.

After the April 16 incident, the girl's mother called the police. The police took the girl to Ashley County Memorial Hospital, where Dr. Garcia performed a "rape kit" examination. This doctor later testified at the trial that, based on his examination, he could not tell if the girl had been raped; however, he also testified that it would be possible for Appellant to have slightly penetrated the girl's vagina without leaving

any physical evidence of the penetration. Six days later, the girl was examined by Dr. Thompson, who testified that it would have been possible for the girl to have engaged in sexual intercourse, although he could not find any evidence of trauma from rape. He also stated that the absence of trauma did not mean that a rape could not have occurred.

Appellant argues eight points for reversal. Appellant's first argument is that the trial court erred in not granting his motion to sever the offenses. Joinder of offenses is governed by A.R.Cr.P. Rule 21.1, which states:

Joinder of offenses. Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both: (a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are

based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Appellant argues that the two rapes were separate occurrences which merely have the same or similar character and are not part of a single plan or a scheme and, therefore, according to A.R.Cr.P. Rule 22.2(a), he had an absolute right to severance of the offenses, which the trial denied. The State contends

Rule 22.2. Severance of offenses. (a) Whenever two (2) or more offenses have been drawn for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

that the two rapes were a part of a general scheme, engineered by Appellant, to sexually

abuse the child. In Arkansas, the established law granting or refusing to grant a severance is within the discretion of the trial court, and the judge's exercise of the discretion will be reversed only if that discretion is abuse. Ruiz v. State, 273 Ark. 94, 617 S.W. 2d 6 (1981). Given the State's evidence, which tends to show that the rapes were part of a general plan or scheme, we cannot say that the trial court abused its discretion in refusing to sever the offenses.

The trial court's determination that the State's evidence showed Appellant's plan or scheme to sexually molest the victim is the key to resolution of another of Appellant's arguments for reversal. Appellant contends the testimony of his sexual abuse of the victim on occasions other than April 10 and 16, 1982, is a violation of Ark. Unif. R. Evid. 404(b). According to the rule, evidence of other crimes, wrongs or acts is admissible to show Appellant's plan, which

was the State's purpose in introducing this evidence. We also note that the trial judge offered to give an instruction to the jury limiting their use of the testimony, and Appellant twice refused the offer. In effect, the Appellant's refusal of the limiting instruction is equivalent to his failure to ask for such an instruction. Failure of a trial court to give an admonitory instruction is not prejudicial error in the absence of a request to do so. Miller v. State, 269 Ark. 341, 605 S.W. 2d 340 (1980). Appellant argues that even if this evidence is admissible under Rule 404(b), it should have been kept out under Ark. Unif. R. Evid. 403 because its probative

Rule 404(b). Other crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person, nor to show that he acted in conformity therewith. It may, however, be

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

value was clearly outweighed by its unfair prejudice. The weighing of probative value and unfair prejudice is committed to the trial court. Its decisions under Rule 403 will not be reversed on appeal unless the trial court has clearly abused its discretion. Price v. State, 268 Ark. 535, 597 S.W. 2d 598 (1980). We do not feel that the trial court abused its discretion because, as explained above, the evidence of Appellant's prior sexual assaults on the victim are highly probative of the existence of an overall plan to sexually abuse the victim.

Appellant also argues that two items of evidence---a movie projector and a reel of film--were improperly admitted because they

were illegally seized, irrelevant and highly prejudicial. Appellant did not put on any evidence in support of his contention that the projector and the film were illegally seized. Instead, he argued at trial and here on appeal that the objects were not permissible objects of a seizure by police because they had no connection to the commission of the rapes. The short answer to this contention, as well as Appellant's other arguments related to the admission of the projector and the film can be found in Hoggard v. State, 277 Ark. 117, 640 S.W. 2d 102 (1982). The Court in Hoggard held that in rape cases involving children, pornography shown by the rapist to the child/victim prior to the rape is relevant and highly probative of the commission of the rape.

Appellant contends that a .38 caliber pistol admitted into evidence against him should have been suppressed because, during the discovery phase of the trial, the State

did not revela that it had the pistol or that it intended to introduce the weapon into evidence. However, the record reveals that on April 16, 1982, the defendant received a copy of the police incident

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.--Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cummulative evidence.

report, which states that a .38 caliber pistol was used as "the method of attack." The provision of the incident report was sufficient to provide the Appellant with the opportunity to discover the State's evidence prior to trial, as is required by Arkansas

law. See Renton v. State, 274 Ark. 87, 622 S.W. 2d 171 (1981). Also, Appellant does not explain, in his argument, how he was prejudiced by the introduction of the pistol. There is a fundamental rule of evidence that error may not be predicated on a ruling which admits evidence unless a substantial right of the parties is affected. Ark. Unif. R. Evid. 103.

Appellant also argues that the trial court erred in not excusing seven jurors for cause. Because the trial court refused to excuse the jurors for cause, the Appellant used up all of his peremptory challenge, and one juror was allowed to sit whom Appellant would have removed if he had had any peremptory challenge left. The record reveals that all of the jurors who Appellant says should have been excused for cause stated during voir dire that they believed Appellant was innocent until proven guilty. When a person states that he or she will

accord the accused his constitutional presumption of innocence, the juror qualifies as impartial under the constitutional requirements. Glover v. State, 248 Ark. 126,455 S.W. 2d 670 (1970). Because these jurors all stated that they would believe the Appellant was innocent until proven guilty, it was not error for the trial court not to strike them for cause. Hill v. State, 275, Ark. 71, 628 S.W. 2d 285 (1982).

Appellant also contends that the testimony of Dr. Barry Thompson was irrelevant and, therefore, inadmissible. The doctor, testifying concerning the results of his examination of the victim, opined it would have been possible for her to have engaged in sexual intercourse and that ninety percent of the male population would be able to sexually penetrate the victim's vagina. Given this testimony by Dr. Thompson, we do not think the trial court abused its discretion in permitting the doctor to

testify. We do not reverse a ruling on relevancy unless we find an abuse of the trial court's discretion in this matter. Hamblin v. State, 268 Ark. 497, 597 S.W. 2d 589 (1980). Appellant also contends that the probative value of Dr. Thompson's testimony was outweighed by its unfair prejudice. After a review of the doctor's testimony, we cannot say the trial court abused its discretion in admitting it. Appellant also cites Fields v. State, 281 Ark. 43, 661 S.W. 2d 359 (1984), for the proposition that proof of the victim's sexual activity is not relevant to whether or not Appellant raped her. This citation is totally inapposite, given the facts of this case, because Fields concerns the application of Arkansas' rape-shields statute, Ark. Stat. Ann. § 41-1810.4 (Repl. 1977), which prohibits defendants, not rape victims, from introducing irrelevant evidence of the victim's prior sexual activity.

Appellant also argues that the State violated Ark. Unif. R. Evid. 615, the witness sequestration rule, during his trial. The State called the non-excluded witness on rebuttal to explain a discrepancy in the State's case--when the victim testified, she stated that the pornographic film Appellant showed her was on one reel; however, when the jury viewed the film, it was on two reels. According to the non-excluded witness, the film was spliced to remove a part that the victim claimed not to have seen. It usually lies within sound judicial discretion whether a witness who has been in the courtroom, in spite of a rule excluding witness therefrom, should be permitted to testify. Mobley v. State, 251, Ark. 448, 473 S.W. 2d 176 (1971). Given the nature of the testimony of this non-excluded witness, we cannot see how Appellant was prejudiced. Appellant, himslef, terms this a technical violation and does not explain how the error prejudiced

him. We do not reverse for nonprejudicial error. Nolen v. State, 278 Ark. 17, 643 S.W. 2d 257 (1982).

As a final argument, Appellant contends that there was not sufficient evidence presented at trial to sustain the conviction because the testimony of the victim was confusing and contradictory. However, conflicts and contradictions in testimony go to the credibility of the witness and the same must be resolved by the jury. Knight v. State, 277 Ark. 213, 640 S.W. 2d 442 (1982). The jury believed the victim, and this Court is bound by its judgement as to the credibility of the witness. Ellis v. State, 279 Ark. 430, 652 S.W. 2d 35 (1983). The evidence is substantial if it is of sufficient force and character to compel a conclusion of reasonable and material certainty. Jones v. State, 269 Ark. 119, 598 S.W. 2d 748 (1980). We find that the State's evidence in this case was sufficient.

The Appellant's conviction is affirmed.

AFFIRMED.

Cracraft and Corbin, JJ., agree.

LAW OF CHANCERY MANDATE

STATE OF ARKANSAS,
SS.
In the Court of Appeals

BE IT REMEMBERED, That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the 1st day of August, 1984, amongst others were the following proceedings, to-wit:

JOHN L. NORD, JR. APPELLANT

VS. NO. CACR83-176

STATE OF ARKANSAS APPELLEE

APPEAL FROM ASHLEY CIRCUIT COURT

NORTHERN DISTRICT

NO. CR82-46

Appellant's motion to stay execution of judgement pending appeal. Mandate stayed for 90 days.

IN TESTIMONY, That the above is a true copy of the order of said Court of Appeals, rendered in the case therein stated, I, DONA L. WILLIAMS, Clerk of said Court of Appeals, hereunto set my hand and affix the Seal of said Court of Appeals, at my office in the City of Little Rock, this _____ day of _____, A.D. 19_____.

_____
DONNA L. WILLIAMS, Clerk